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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

ARTERO COLLINS,

Defendant and Appellant.

B232891

(Los Angeles County Super. Ct.  
No. YA078552)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark S. Arnold, Judge. Affirmed.

Carter Sands & Ehrenreich and Richard D. Carter for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Stacy S. Schwartz, Deputy Attorneys General, for Plaintiff and Respondent.

The jury found defendant and appellant Artero Collins guilty in counts 1 and 2 of assault with a firearm (Pen. Code, § 245, subd. (a)(2)).<sup>1</sup> He was found not guilty of assault with a firearm in count 3. The jury found true the allegations that defendant personally used a handgun within the meaning of section 12022.5, subdivision (a) in the commission of both offenses. Following a bench trial, the court found true allegations that defendant had been convicted of a serious felony (§ 667, subd. (a)), suffered a prior conviction under the three strikes law (§§1170.12, subds. (a)-(d), 667, subds. (b)-(i)), and served a prior prison term (§ 667.5, subd. (b)).

Probation was denied. Defendant was sentenced to state prison in count 1 for 24 years. The trial court selected the upper term of four years on count 1, doubled as a result of the prior conviction under the three strikes law. Enhancements were imposed of ten years for the firearm use allegation, five years for the serious felony prior conviction, and one year for the prior prison term. A concurrent eight-year term was imposed on count 2.

Defendant argues the prosecution failed to disclose evidence favorable to him in violation of *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*), warranting a new trial. He further alleges the trial court erred in admitting irrelevant gang evidence that was prejudicial and cumulative. In a supplemental brief after augmentation of the record, defendant argues the trial court abused its discretion by twice refusing to continue the trial in order to allow private counsel to substitute in and have adequate time to prepare. We affirm. Defendant's first contention is not properly before this court, as it is based on matters outside the record on appeal.<sup>2</sup> We hold the trial court did not abuse its discretion in admitting gang evidence. We further hold the trial court did not abuse its discretion in denying continuances of the trial.

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<sup>1</sup> Unless otherwise indicated, all statutory references are to the Penal Code.

<sup>2</sup> By separate order, we order portions of defendant's opening brief stricken for attaching documents that were not before the trial court and are not part of the record on appeal.

## FACTS

### *Prosecution Evidence*

On April 18, 2010, John McGhee was working as a security guard at The Social Club on Normandie in Los Angeles. Defendant, who appeared intoxicated, was escorted out of the club by McGhee because of his rude behavior, “calling out his set,” and repeatedly called out his gang’s name, “B.P.”

Derwin Gibson was working with McGhee at The Social Club. At approximately 5:30 a.m., Gibson and McGhee saw defendant banging on the door of the club, demanding to be let back in. Gibson heard defendant yell, “You better watch your back, that’s on Black P Stone,” and then saw him walk away. Gibson and McGhee went outside to make sure that defendant had left the premises. They saw defendant walking back toward them carrying a gun. Gibson grabbed McGhee, ran into the club, and locked the door behind them. Gibson and McGhee then heard a gunshot.

After the shooting, Sandra Davis, another security guard at the club, called 9-1-1. Deputy Lawrence Laughlin responded to the scene and interviewed McGhee, Gibson, and Davis. Davis told him the shooter was known as “Poppy” or “Bobby.” She also said the shooter had been kicked out of the club, but returned with a gun and pointed it at her and her coworkers. After being kicked out, the shooter was banging on the door and saying, “Let me in. This is P Stone gang.” Davis described the shooter as a light-skinned African American male, approximately 5’8” to 5’10” and 180 pounds, with braids like corn rows, wearing a black T-shirt with designs on it.<sup>3</sup>

Gibson told Laughlin that the shooter was wearing a red button down shirt and a red cap. He described the shooter as a light-complected African American with braids in

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<sup>3</sup> At trial, Davis denied making these statements or even being interviewed by the deputy.

his hair, around 23 or 24 years of age. He stated that he was able to see the shooter's face through the screen door of the club.

Gibson saw defendant return to the club a week or two after the incident. Gibson recognized him, but did not call the authorities because he "was worried about what would possibly happen again if [the shooter] knew that [he] was on the phone calling the police."

On July 11, 2010, Gibson saw defendant at the club again with other men. One of the men with defendant apologized to Gibson for his "homeboy's actions." Gibson told the man that he would not allow someone who shot at him into the club. When defendant and the other men began to disburse, Gibson got the attention of a sheriff's deputy who was patrolling the street and told him that defendant had fired a shot at him in April. Defendant was then arrested.

On July 9, 2010, Detective Phil Rodriguez of the Los Angeles Police Department gang unit assisted fellow officers in updating gang photographs, including photographs of defendant. Detective Rodriguez testified with respect to his personal knowledge of defendant, including that defendant had admitted his gang affiliation and his moniker to the detective and his partners. Detective Rodriguez also gave expert testimony with respect to the Black P Stone gang.

In telephone calls recorded while defendant was in jail, defendant referred to himself as "Pop" or "Poppy."

### ***Defense Evidence***

Patricia Triplett, also a security guard at the club, testified that she recalled four or five African-American men being kicked out of the club that night, but she did not recall whether defendant was among them. She was in the lobby of the club with McGhee, Gibson, and Davis when she heard a gunshot. She did not see the person who fired the gun.

Chester Waingo was collecting recyclables near the club early on the morning of the shooting, when he saw a man with a gun walk past him quickly. The man was approximately six feet away from Waingo. He did not look at the man's face because he was focused on the gun. When he saw the gun, he ran away. Later, Waingo heard a gunshot. Waingo was interviewed by authorities approximately ten months later and was unable to pick out the man carrying the gun from a six-pack photo line-up.

### ***Rebuttal***

On November 2, 2010, Davis spoke with defense investigator, Craig Peters, regarding the shooting. In the interview, Davis said that she heard one of the shooter's friends say, "Bobby, come on." She heard the same friend say either "Black Keystone" or "P Stone." She described the shooter as a light-complected African American male with corn row braids.

## **DISCUSSION**

### ***The Alleged Brady Violation***

Defendant argues the prosecution suppressed an investigation report containing evidence of an alibi witness in violation of *Brady, supra*, 373 U.S. 83. Defendant contends that if this favorable evidence had been disclosed, there is a reasonable probability the outcome of the trial would have been different, such that a new trial is required.

The Attorney General filed a motion to strike defendant's opening brief, arguing the three exhibits were not admitted into the record or presented to the trial court and, therefore, cannot be considered by this court in the first instance. We agree and by separate order strike the exhibits attached to defendant's opening brief and disregard any reference to them for purposes of appeal.

“‘[A]n appeal reviews the correctness of a judgment as of the time of its rendition, upon a record of matters which were before the trial court for its consideration.’ [Citation.]” (*In re Zeth S.* (2003) 31 Cal.4th 396, 405.) Accordingly, this court reviews only documents presented to the trial court, and disregards statements in a brief that rely on matter outside of the record. (*Pulver v. Avco Financial Services* (1986) 182 Cal.App.3d 622, 632.) Limiting review of facts to those contained in the record “preserves an orderly system of appellate procedure by preventing litigants from circumventing the normal sequence of litigation.” (*Reserve Insurance Co. v. Pisciotta* (1982) 30 Cal.3d 800, 813.)

California Rules of Court, rule 8.204(a)(2)(C) requires that all briefs “[p]rovide a summary of the significant facts *limited to matters in the record*.” (Emphasis added.) If a brief does not comply with the rule and has already been filed, the reviewing court may “[o]rder the brief returned for corrections and refile within a specified time; [¶] . . . [s]trike the brief with leave to file a new brief within a specified time; or [¶] . . . [d]isregard the noncompliance.” (Cal. Rules of Court, rule 8.204(e)(2).)

Because there is no foundation in the record on appeal to support the claim of *Brady* error, we summarily reject defendant’s first contention without further discussion.

### ***Admission of Gang Evidence***

Defendant argues the trial court erred in admitting irrelevant, cumulative, and prejudicial gang evidence, specifically, transcripts of portions of telephone conversations defendant engaged in while incarcerated (“jail calls”), the expert testimony of Detective Rodriguez, and gang photographs of defendant. Defendant asserts the error was not harmless because it is reasonably probable that he would have obtained a more favorable result had the evidence been excluded.

In general, evidence is admissible if its probative value is not substantially outweighed by the probability that it will unduly consume time, “create substantial danger of undue prejudice,” confuse the issues, or mislead the jury. (Evid. Code, § 352.)

Evidence is probative if it “tends ‘logically, naturally, and by reasonable inference’ to establish material facts such as identity, intent, or motive. [Citations.]” (*People v. Garceau* (1993) 6 Cal.4th 140, 177 (*Garceau*), overruled on another ground in *People v. Yeoman* (2003) 31 Cal.4th 93, 117-118.) “[E]vidence of gang membership is often relevant to, and admissible regarding, the charged offense. Evidence of the defendant’s gang affiliation—including evidence of the gang’s territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like—can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime.” (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049 (*Hernandez*).) The courts recognize, however, that gang evidence may have a “highly inflammatory” impact. (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1167 (*Samaniego*).) Where no gang enhancement is alleged “evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal.” (*Hernandez, supra*, at p. 1049.) Nevertheless, gang evidence may be admitted “if it is relevant to a material issue in the case other than character, is not more prejudicial than probative, and is not cumulative.” (*Samaniego, supra*, at p. 1167.) “[T]he decision on whether evidence, including gang evidence, is relevant, not unduly prejudicial and thus admissible, rests within the discretion of the trial court.” (*People v. Albarran* (2007) 149 Cal.App.4th 214, 224-225.) We review the trial court’s ruling for abuse of discretion. (*Id.* at p. 225.)

Prior to trial, the prosecution moved to admit evidence of defendant’s gang membership and moniker for the purposes of proving motive and identity. Defendant opposed admission of the gang evidence as irrelevant and inflammatory, arguing that the prejudice to defendant “vastly outweighed” its probative value. The trial court admitted the gang evidence on the issues of motive, intent, and consciousness of guilt. Relying on *Garceau, supra*, 6 Cal.4th 140 and *People v. Karis* (1988) 46 Cal.3d. 612, the trial court reasoned that “[a]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant’s case. The stronger the evidence, the more it’s prejudicial. The prejudice referred to in [Evidence Code section] 352 applies to evidence which uniquely tends to

. . . evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. Prejudicial is not synonymous with damaging.”

The trial court did not abuse its discretion in admitting the gang evidence. In the “jail calls” to which defendant objects, defendant refers to himself as “Pop” and is identified as “Poppy” by the person to whom he is speaking. In a portion of the jail calls transcript highlighted by the defendant as damaging to his character, defendant also makes multiple references to “blood.” It can be reasonably inferred from the conversations in the jail calls that defendant goes by the name “Pop” or “Poppy,” and that he is affiliated with a “Blood” gang. This evidence connects defendant to the shooting through Davis’s statement to Deputy Laughlin that the perpetrator was known to her by the name “Poppy” or “Bobby.” Moreover, Gibson testified that, while banging on the club door, the shooter said: “You better watch your back, and that’s on Black P-Stone,” which is a Blood gang. McGhee also testified that the shooter was “calling out his set,” or gang name, “BP.” Defendant’s multiple identifications of himself as “Pop” or “Poppy” and repeated references to “blood” in one conversation tended to reasonably prove identity, and the trial court could reasonably conclude the references were not unduly prejudicial as that term is used in Evidence Code section 352.

The expert testimony of Detective Rodriguez to which defendant objects is similarly probative of identity. Detective Rodriguez’s testimony that gang members use monikers to avoid documentation by law enforcement tended to explain why the shooter, who identified himself as affiliated with Black P-Stone, would go by a name other than his given name due to his gang affiliation.

Detective Rodriguez’s testimony that defendant was wearing a red shirt and a red St. Louis baseball cap was also relevant to his identity, because, as Detective Rodriguez went on to explain, red is the color that the Black P-Stones wear to signify their affiliation with the gang. The fact that, in Detective Rodriguez’s expert opinion, members of Blood gangs cross out the “c’s” in words to show their hatred for the rival Crip gang tends to establish that defendant, who has a tattoo on his arm with the “c’s” crossed out, is a member of a Blood gang. Defendant’s admission to the detective of



using the moniker “Poppy” and his affiliation with the Black P-Stones also tended to establish the identity of the shooter. Finally, defendant’s gang photographs, which were taken by members of the gang unit two days before his arrest, support the logical inference that defendant was an active member of the same gang with which the shooter identified himself.

Other expert testimony by Detective Rodriguez tended to establish motive for the shooting. Contrary to defendant’s assertions, evidence of motive is admissible although it is not an element of the crime charged. (*People v. Scheer* (1998) 68 Cal.App.4th 1009, 1017-1018.) Detective Rodriguez’s description of the structure of the gang, which encourages increasing violence as members move up the ranks, logically supports the conclusion that defendant shot at the victims because of his gang affiliation. Detective Rodriguez opined that if a gang member is a shooter for the gang, he might be inclined to retaliate for being disrespected by shooting. Based on this testimony, the jury could reasonably infer that the shooter, who had been physically removed from the club and thus humiliated, retaliated by firing a gun.

Defendant argues the gang evidence was cumulative and therefore should have been excluded. This is incorrect. Identity was not conclusively established through non-gang evidence, so the issue was open to further proof. (*Evans v. Industrial Acc. Com.* (1945) 71 Cal.App.2d 244, 248-49.)

We conclude the gang evidence admitted was highly relevant to identity and motive. It was not, as a matter of law, so prejudicial as to lead to undue prejudice. No abuse of discretion has been shown.

### ***Denial of the Motions to Continue the Trial***

On July 2, 2012, defendant filed an application for settled statement with this court with respect to his two requests for continuance to allow proposed substitute counsel to prepare for trial. Defendant requested augmentation of the record to include open court discussions regarding the continuance requests not contained in the reporter’s transcript.

Defendant additionally asked for a 30-day extension to file a supplemental brief and continuation of oral argument, which was set for July 27, 2012. On July 3, 2012, this court ordered the trial court to hold a hearing within 30 days of its order and prepare a settled statement concerning any substitution of counsel motions to be filed with this court within 10 days of the hearing. The parties were given 20 days following the filing of the settled statement to file supplemental briefs on the issue. The trial court held the hearing on July 20, 2012, and filed a settled statement on July 23, 2012. Oral argument before this court took place on July 27, 2012, as scheduled. Defendant filed a timely supplemental brief on August 13, 2012.<sup>4</sup>

The now-complete record reveals the following circumstances surrounding the motions to continue. Trial was initially set for January 12, 2011. On that date, the deputy public defender representing defendant made the first request for continuance to allow defendant to retain private counsel. The trial court granted the continuance. A minute order in the clerk's transcript and a transcript of an open court discussion on January 20, 2011, contained in the augmented record on appeal show that the deputy public defender informed the court he had received a voice mail from retained private counsel advising him that he would not be substituting in to represent defendant. The matter was continued for an additional week to allow the deputy public defender, who had not anticipated trying the case, to subpoena potential defense witnesses and obtain additional discovery items from the prosecution. The court announced that there would be no further continuances granted in the case.

Although there is no reporter's transcript of the conversation, the trial court, private counsel, the deputy public defender, and the prosecutor all agree that on a date sometime between January 12, 2011, and March 3, 2011, private counsel requested a continuance of 60 days to prepare for trial on the basis that although he was an experienced civil litigator, he had never tried a criminal case. The court refused to grant a 60-day continuance but stated that it would grant a 30-day continuance—which would

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<sup>4</sup> The Attorney General did not file a supplemental brief.

have gone beyond the date then set for trial—and allow private counsel to substitute in. Private counsel declined, stating that 30 days would not be sufficient preparation time to adequately represent defendant.

A reporter's transcript in the augmented record shows that private counsel appeared at a March 3, 2011 readiness conference and was allowed to address the trial court. He asserted that more than 60 days had passed since his request for the 60-day continuance was denied<sup>5</sup> and made a third request for a continuance, this time for 45 days, to prepare to represent defendant. The court denied the request, explaining that defendant had been arraigned in October 2010, and that it had previously stated at the January 20, 2011 hearing that no further continuances would be granted. The continuances had only been granted because there had been new or late discovery by the prosecution and because the deputy public defender required a continuance to be present at his 13-year-old daughter's jaw surgery. The court granted private counsel permission to represent defendant if he could be ready the next day, which private counsel declined as impossible. The court then ordered that the deputy public defender remain counsel of record. The deputy public defender made an unopposed request that jury selection be deferred until the following Monday, which the court granted. The court offered private counsel the opportunity to represent defendant if he could prepare for trial over the weekend. Private counsel declined, stating that he did not yet have defendant's file and could not prepare to defend him in such a short time.

Defendant argues that the trial court abused its discretion by denying his second and third requests for continuance to allow his proposed substitute counsel to prepare for trial. We disagree.

“Generally the trial court has discretion whether to grant a continuance to permit a defendant to be represented by retained counsel. [Citation.] ‘The right of a defendant to appear and defend with counsel of his own choice is not absolute[, however].’

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<sup>5</sup> In fact, the number of days that had passed since the second request for continuance could not have been more than 50 days, as the request could not have been made prior to January 12, 2011.

[Citations.] ‘A continuance may be denied if the accused is “unjustifiably dilatory” in obtaining counsel, or “if he arbitrarily chooses to substitute counsel at the time of trial.” [Citation.]’ [Citation.] In deciding whether the trial court’s denying a continuance was so arbitrary as to deny due process, this court ‘looks to the circumstances of each case, “particularly in the reasons presented to the trial judge at the time the request [was] denied.”’ [Citations.]’ [Citation.] [¶] . . . [¶] Where a continuance is requested on the day of trial, the lateness of the request may be a significant factor justifying denial absent compelling circumstances to the contrary. [Citation.]’ (*People v. Jeffers* (1987) 188 Cal.App.3d 840, 850 (*Jeffers*).) The burden is on the defendant to show that the trial court abused its discretion in denying a request for a continuance to secure new counsel. (*People v. Rhines* (1982) 131 Cal.App.3d 498, 506.)

The facts of *People v. Courts* (1985) 37 Cal.3d 784 (*Courts*), upon which defendant relies, differ significantly from the facts in this case. In *Courts*, the defendant contacted private counsel regarding substituting in for the public defender several weeks before the trial was scheduled to begin. (*Id.* at p. 787.) He met with the private attorney several times and attempted to raise money for the attorney’s fees. (*Ibid.*) The defendant requested a continuance at a trial setting conference eight days before trial was set, to allow him to make final payment arrangements. (*Id.* at p. 788.) The trial court denied the request as untimely. (*Ibid.*) On the same day, private counsel stated his willingness to represent the defendant if a continuance was granted. (*Ibid.*) The defendant retained private counsel five days prior to trial. (*Ibid.*) The trial court, however, refused to place a motion on calendar for substitution of attorney and a continuance. (*Ibid.*) On the day set for trial, the defendant’s public defender requested a continuance. (*Ibid.*) Retained counsel appeared and stated his willingness to represent the defendant, “if ‘some sort of continuance’ were granted.” (*Ibid.*) The court denied the motion, finding that the hiring of retained counsel was not significant because it was conditioned on the continuance. (*Ibid.*) Afterwards, the defendant filed a declaration summarizing the steps he had taken to retain private counsel and explaining that he wanted experienced private counsel to defend him against the very serious charges of murder and use of a firearm rather than the

inexperienced public defender. (*Id.* at pp. 788-789.) The court set aside its ruling and reconsidered the motion but ultimately denied it again without comment. (*Id.* at p. 789.)

Our Supreme Court concluded the trial court in *Courts* had abused its discretion, because the defendant acted diligently to obtain counsel before trial and the motion, made over a week before trial, was timely and made when the retainer arrangement was imminent. (*Courts, supra*, 37 Cal.3d at p. 792.) The Supreme Court noted that, “[i]n this regard, [the] continuance request should be contrasted with the eve-of-trial, day-of-trial, and second-day-of-trial requests . . . [citations]. In those cases, the Courts of Appeal found the lateness of the continuance request to be a significant factor which justified a denial where there were no compelling circumstances to the contrary. [Citation.]” (*Id.* at p. 792, fn. 4.) The Supreme Court also observed that “the ‘mammoth responsibility’ of defending a client charged with murder [citation] should not be undertaken without assuring that effective assistance -- which contemplates more than a few days’ preparation for trial -- can be rendered.” (*Id.* at p. 794, fn. 8.)

In contrast to the defendant in *Courts*, who requested a continuance to retain an attorney eight days prior to trial and was denied any additional time, in this case, defendant was granted a continuance to retain private counsel on January 12, 2011, the day set for trial. Sometime thereafter, the trial court offered to grant defendant a continuance of 30 days for private counsel to prepare for trial. Although the charges against defendant were serious, the amount of time the court offered private counsel to prepare was a reasonable exercise of discretion and was significantly greater than the continuance of “a few days” contemplated in *Courts*. Moreover, whereas the defendant in *Courts* explained in a declaration that he wished to retain experienced private counsel to defend him rather than rely on an inexperienced public defender in a murder case, here defendant did not file a declaration of reasons for wanting to retain private counsel. The only reason given for requesting a 60-day continuance was private counsel’s inexperience with criminal litigation. On this record, we cannot conclude that defendant presented “compelling circumstances supporting his late request for continuance,” such that the

court abused its discretion in offering a continuance of 30 days but denying the request for a continuance of 60 days. (*Jeffers, supra*, 188 Cal.App.3d at p. 850.)

Defendant's third request for a continuance, this time for 45 days, was made the day before the continued trial date. As the trial court explained, the request was untimely, given that defendant had been arraigned in October of the previous year, and the trial had already been delayed for almost two months. Although as many as 50 days had passed since defendant first requested a 60-day continuance, the trial had been continued for unforeseen reasons and only for good cause, and there were no compelling circumstances to justify further delay. Under the circumstances, we conclude the trial court acted within its discretion in denying defendant's third motion for continuance as well.

### **DISPOSITION**

The judgment is affirmed.

KRIEGLER, J.

We concur:

ARMSTRONG, Acting P. J.

MOSK, J.